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SUPREME COURT, U.S.

NO. 80-777

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FRANK BLACKBURN,

Petitioner,

-versus-

IRVIN THOMAS,

Respondent,

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

MOTION TO PROCEED IN FORMA PAUPERIS

MAY IT PLEASE THE COURT:

Respondent Irvin Thomas is presently incarcerated and in necessitous circumstances, and was represented in the Fifth Circuit by the undersigned counsel, who was appointed by that court to represent him under the Criminal Justice Act. Accordingly, Respondent Irvin Thomas respectfully prays that this Court allow him to proceed herein in forma pauperis and represented by the undersigned, his court-appointed counsel.

Respectfully submitted:

Irvin Thomas, in forma pauperis,
through his court-appointed counsel

Robert M. Steeg
1440 Oil & Gas Building
New Orleans, Louisiana 70112
(504) 581-9362

BY: Robert M. Steeg
ROBERT M. STEEG

ORDER

CONSIDERING THE FOREGOING,

IT IS ORDERED, ADJUDGED AND DECREED that Respondent herein, Irvin Thomas, be, and the same hereby is, permitted in the above-captioned matter to proceed in forma pauperis and represented by the counsel previously appointed to represent him under the Criminal Justice Act, Robert M. Steeg.

JUSTICE, UNITED STATES SUPREME COURT

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served upon each counsel of record in this proceeding by depositing a copy of same in the United States Mail, duly addressed to each of said counsel postage prepaid, this 10 day of December, 1980.

Robert M Steeg

ROBERT M. STEEG

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OPPOSITION TO PETITION FOR CERTIORARI

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New Orleans, Louisiana 70112
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QUESTIONS PRESENTED

1. Whether this Court's decision in Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029 (1978), declaring that a five-member jury is too small to afford a criminal defendant a constitutionally sufficient fact-finding body, should be applied retroactively to invalidate Irvin Thomas' conviction in 1972 by a five-member jury?

2. Whether Irvin Thomas should be barred from raising his federal constitutional claim in this petition for federal habeas corpus relief on the ground that he failed to comply with Louisiana's contempraneous objection rule and raise this claim at the time of his state criminal trial?

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For the Fifth Circuit

OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Pursuant to Rule 34.2 of this Court, Respondent Irvin Thomas' statement of the case will be limited to what he considers necessary to correct omissions in Petitioner's statement.

In May, 1978, Irvin Thomas filed a petition for a writ of habeas corpus in the Louisiana district court, contending that his conviction by a five-member jury had violated his federal constitutional rights. The precise claim presented in Thomas' state habeas petition was that "petitioner's trial on a serious criminal charge before a five-member jury deprived him of his right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution."

The state district court issued written reasons for its denial of habeas relief. It stated:

> In this application for a writ of habeas corpus, he claims that he was entitled to a twelve-man jury.
> The law in effect at that time, Act 59 of 1971, has been interpreted to entitle a defendant to only a five-member jury. State v. Martin, 290 So.2d 872 (La. 1974).
> The application is denied.

The Louisiana Supreme Court denied Thomas' application for a writ of certiorari and/or supervisory writs without written reasons.

SUMMARY OF ARGUMENT

The decision of the Fifth Circuit below was succinct and well-reasoned. It applied the standards governing retroactivity of a new rule of constitutional criminal procedure to the new rule set out by this Court in Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029 (1978), and found these standards to be met. As this Court has done in numerous similar instances, the Fifth Circuit therefore applied Ballew's new rule retroactively to the case before the court without regard to whether it arose on direct review or collateral attack.

The Fifth Circuit properly reached the merits of Irvin Thomas' federal constitutional claim, because neither the state district court nor the Louisiana Supreme Court had relied upon an independent state procedural ground in denying Thomas habeas corpus relief.

Except for Irvin Thomas, only a handful of other persons, all of them in Louisiana, will be directly affected by the Fifth Circuit's decision in this matter. The instant case thus not only was correctly decided by the Fifth Circuit but also is of very limited application, and it does not warrant review by this Court.

ARGUMENT

I.

Having found the applicable legal standards governing retroactivity to be met, the Fifth Circuit correctly gave Ballew complete retroactivity.

In its decision below, the Fifth Circuit employed the legal standards that have been developed by this Court in determining whether a new rule of constitutional criminal procedure shall be applied retroactively. First, the court identified the three criteria set out in Linkletter v. Walker, 381 U.S. 618, 636, 85 S.Ct. 1731, 1741 (1965), and Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970 (1967) -- namely (a) the purpose of the new rule, (b) the reliance placed on the old rule, and (c) the effect of retroactivity upon the administration of justice. Utilizing the approach to these criteria enunciated by this Court in Desist v. United States 394 U.S. 244, 249, 89 S.Ct. 1030, 1033 (1969), Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 1152 (1971), and Brown v. Louisiana, ____ U.S. ____, 100 S.Ct. 2214, 2219 (1980), the Fifth Circuit went on to note that:

> Foremost among these factors is the purpose to be served by the new constitutional rule. ... Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administra-

tion of justice has sufficed to require prospective application in these circumstances.

Thomas v. Blackburn, 623 F.2d 383, 384-85 (1980) (citations omitted).

The Fifth Circuit concluded that Ballew was meant to overcome a defect in the criminal trial -- the 5-member jury -- that substantially impairs its truth-finding function. This conclusion can hardly be gainsaid, and Petitioner Blackburn does not challenge it in his Petition for Certiorari. In Ballew, this Court found that five-person juries are too small to permit effective group deliberation; too small to achieve accurate and consistent results; and too small to avoid an imbalance in favor of the prosecution. 435 U.S. at 232-36, 98 S.Ct. 1035-37. The Court held that the "functioning" of a five person jury is "seriously impaired" and that there is "substantial doubt" about its reliability. Id. at 239, 98 S.Ct. at 1038. In sum, the entire factfinding body itself is not large enough to reach an accurate, unbiased verdict.

Having found that the applicable standards called for the Ballew rule to be given retroactive effect, the Fifth Circuit then followed 15 years of Supreme Court practice and applied the new rule retroactively to Irvin Thomas' case without regard to whether it arose on direct review or collateral attack.

In applying its standards governing retroactivity of new rules of constitutional criminal procedure, this Court has

consistently and repeatedly refused to distinguish between cases on direct review and those on collateral attack. When the standards governing retroactivity are met, the new constitutional rule is applied retroactively in both situations. When the standards are not met, the new rule is not applied in either instance.

This Court has been explicit in its refusal to make such a distinction in the area of constitutional criminal procedure. In Stovall v. Denno, supra, the Court held that for purposes of applying the Linkletter criteria to determine retroactivity, "no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review." 383 U.S. at 300, 87 S.Ct. at 1972. In Williams v. United States, supra, the Court carefully reviewed its position on retroactivity and declared: "Nor have we accepted as a dividing line the suggested distinction between cases on direct review and those arising on collateral attack." 401 U.S. at 651-52, 91 S.Ct. at 1151-52 (footnote omitted). In several other cases, this Court has explicitly stated that in applying the Linkletter - Stovall retroactivity criteria, no distinction will be made between cases on direct review and those arising on collateral attack. Hill v. California, 401 U.S. 797, 802, 91 S.Ct. 1106, 1110 (1971); Desist v. United States, 394 U.S. 244, 252-53, 89 S.Ct. 1030, 1035-36 (1969); Johnson v. New Jersey, 384 U.S.

719, 732-33, 86 S.Ct. 1772, 1780-81 (1966).

In its various decisions, this Court has remained true to this position. When the Court has found that the standards governing retroactivity of a new rule of constitutional criminal procedure are not met, it has denied any retroactivity at all, even in cases on direct review. United States v. Peltier, 422 U.S. 534, 535-39, 95 S.Ct. 2313, 2316-18 (1975); Adams v. Illinois, 405 U.S. 278, 285, 92 S.Ct. 916, 920 (1972); Williams v. United States, supra; Hill v. California, supra; Desist v. United States, supra.

Conversely, when this Court has found that the standards are met, it has given retroactive application to the new rule of constitutional criminal procedure without regard to whether the case before the Court arose on collateral attack. Roberts v. Russell, 392 U.S. 293, 88 S.Ct. 1921 (1968); McConnell v. Rhay, 393 U.S. 2, 89 S.Ct. 32 (1968); Arsenault v. Massachusetts, 395 U.S. 5, 89 S.Ct. 35 (1968). Accord Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963).

The instant case presents a situation identical to that presented in the cases cited immediately above, and the Fifth Circuit's action in this situation followed that of the Supreme Court. Having found the applicable standards to be met, it gave the Ballew rule complete retroactive effect, making no distinction between cases on direct review and those arising out of collateral attack.

II.

The state courts' denial of habeas corpus relief was not based on an independent state procedural ground, and the Fifth Circuit therefore properly reached the merits of Respondent's federal constitutional claims.

In Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977), this Court set out the rule that if a state court refuses to consider a petitioner's federal constitutional claim on the basis of a procedural default under applicable state law, a federal court will refrain from considering that federal claim in the absence of a showing of "cause" and "prejudice." This rule is based upon the principle that if there exists an independent state-law ground for a state court's denial of habeas relief, the federal court should respect that ground and leave the decision based upon it undisturbed, despite the existence of an underlying federal question. Id. at 81-83, 97 S.Ct. at 2503-04.

There is no question that, under such circumstances, a federal court would have the power to consider the federal constitutional claims presented. Id. at 84, 97 S.Ct. at 2505; Francis v. Henderson, 425 U.S. 536, 538-39, 96 S.Ct. 1708, 1710 (1976). However, out of considerations of comity and orderly judicial administration, this Court has ordered the federal courts not to exercise that power if the state courts have disposed of the case because of a procedural default under state law. Id. It is the existence of an independent

state procedural ground that "bars the federal courts from addressing the [federal constitutional] issue on habeas corpus." County Court v. Allen, _____ U.S. _____, _____, 99 S.Ct. 2213, 2220 (1979).

To determine whether the Wainwright v. Sykes rule applies, then, one must ask whether the state court denied habeas relief on the basis of an independent state procedural ground. County Court v. Allen, supra at _____, 99 S.Ct. at 2220 If it did, as in Wainwright v. Sykes and Francis v. Henderson, both supra, the federal court can review the merits of the claim only upon a showing of "cause" and "prejudice."

If the state court did not dispose of the petitioner's federal constitutional claim on the state procedural ground, the federal court is free to reach the merits. County Court v. Allen, supra at ____, 99 S.Ct. at 2220. Because the state court has not relied upon state law in disposing of the claim, the federal court may consider the federal constitutional issues without implying any disrespect to the state. Id. at _____, 99 S.Ct. at 2223. When the state court's decision is based upon its view of the merits of a petitioner's constitutional claim, the federal courts may evaluate the merits of that claim as well. Franks v. Delaware, 438 U.S. 154, 161-63, 98 S.Ct. 2674, 2679-80 (1978); Castaneda v. Partida, 430 U.S. 482, 485 n. , 97 S.Ct. 1272, 1275 n. 4 (1977) See generally Coleman v. Alabama, 377 U.S. 129, 132-33, 84 S.Ct. 1152,

1153-54 (1964).

The Circuit Courts have accurately perceived that the Wainwright v. Sykes doctrine is to be applied in this manner. E.g. Moran v. Estelle, 607 F.2d 1140, 1141-42 (5th Cir. 1979). Indeed, the case relied upon by Petitioner in his Petition for certiorari, Hockenbury v. Sowders, 620 F.2d 111 (6th Cir. 1980), follows this precise approach. The Sixth Circuit recognized that under Wainwright v. Sykes a petitioner's earlier "failure to comply with a state's contemporaneous objection requirement cannot be deferred to as a separate and independent procedural ground precluding federal review if the state itself did not preclude direct review on the basis of that requirement." 620 F.2d at 115 (emphasis added). Presented with the unique situation where the state court both found a procedural default under state law and discussed the merits of the federal constitutional claim, the Sixth Circuit fashioned a rule to determine the "central question" of "whether the state court denied petitioner's claim based on an adequate and independent state ground." Id. Because the state court had explicitly noted the procedural bar while only cursorily reviewing the substantive claim, the Sixth Circuit concluded that "it relied on the procedural ground in denying petitioner's claim." Id. at 116.

In the instant case, Irvin Thomas did fail to comply with Louisiana's contemporaneous objection rule, LSA-C.Cr.P. 841,

by not challenging the five-member jury at the time of his trial. However, under no circumstances could it be argued that the state courts denied habeas corpus relief to him on this ground. This procedural point was apparently not raised by Frank Blackburn in the habeas proceedings before either the state district court or Louisiana's Supreme Court. Compare County Court v. Allen, supra. Neither state court mentioned this matter at all in their denials of habeas relief. Compare id. Thomas' federal constitutional claim, however, was clearly presented to both of these courts in the state habeas proceedings. The district court, in its opinion denying Thomas' petition for habeas corpus, reached what it perceived to be the merits of his claim. Compare id. The state Supreme Court affirmed without written reasons. Compare id.

Under these cirumstances, there clearly was no independent state ground for the state courts' denial of habeas relief. There is no reason to believe that the state courts relied upon (or even thought about) Thomas' state procedural default. No disrespect is shown to the state courts by the federal courts' reaching the merits of Thomas' federal constitutional claim, and the Fifth Circuit was thus entirely correct in doing so.

The substantive issues presented in the instant case, though serious, are limited in their application not only to

the Fifth Circuit, but indeed to the State of Louisiana. Only two states other than Louisiana -- Georgia and Virginia -- have allowed criminal trials before five-member juries. They did so only in misdemeanor cases. Thus, no one is currently in prison in those states on the basis of pre-1978 convictions by five member juries.

Within Louisiana, moreover, the issues presented in the instant case are limited in their application to a handful of persons. The Louisiana provision for trial before a five-member jury was eliminated in 1974. It applied to a particular range of moderately serious offenses -- those for which imprisonment at hard labor was optional. La. Const. of 1921, Art. 7, §41; LSA-C.Cr. P. Art. 782. other than the instant case are known in which a Louisiana prisoner is seeking habeas corpus relief based upon the retroactive application of Ballew. As the Fifth Circuit noted below, the remainder of persons convicted before 1974 by five-member juries have probably been released from prison or were never sentenced to prison in the first place. Thomas v. Blackburn, 623 F.2d 383, 386 (5th Cir. 1980).

These factors militate even further against this Court's exercising certiorari jurisdiction over the instant case. There is (and will be) no conflict among the Circuits. The Fifth Circuit's decision is not in conflict with applicable decisions of this Court. To the contrary, its decision is

solidly based upon principles that have repeatedly been enunciated by this Court. There is no need for the Supreme Court to settle the questions decided by the Fifth Circuit, for that court's decision is entirely adequate to handle the handful of persons that may be affected by it.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari in the instant case should be denied. Considering both the correctness of the Fifth Circuit's decision and its limited application, the instant case is not one that warrants review by this Court.

Respectfully submitted:

Irvin Thomas, *in forma pauperis*,
through his court-appointed counsel

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BY: Robert M Steeg
ROBERT M. STEEG

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Opposition to Petition for Writ of Certiorari has been mailed, postage prepaid, to the following:

Barbara B. Rutledge
Assistant Attorney General
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Room 821
New Orleans, Louisiana 70112

Attorney of Record for Petitioner

I further certify that all parties required to be served have been served.

New Orleans, Louisiana this 10 of December, 1980.

Robert M. Steeg

ROBERT M. STEEG